United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6005

To be argued by
JOHN S. SIFFERT

B P/S P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

C. A. Docket No.

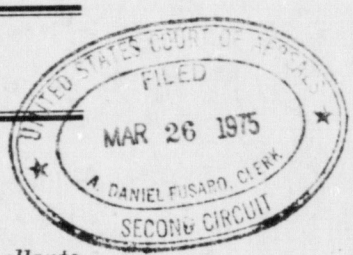
CHELSEA NEIGHBORHOOD ASSOCIATIONS, PENN SOUTH PARENTS, CHELSEA-ELLIOTT TENANTS ASSOCIATION, COUNCIL OF CHELSEA BLOCK ASSOCIATIONS, KELVIN L. and ELLA MARIE KEAN, BEVERLY RUBIN and FRANCES LOPATIN,
Plaintiffs-Appellees,

—against—

UNITED STATES POSTAL SERVICE and E. T. KLASSEN,
Individually and as Postmaster General,
Defendants-Appellants.

APPEAL FROM AN ORDER OF PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TO BE ARGUED BY
JOHNS S. SIFFERT

- x

CHELSEA NEIGHBORHOOD ASSOCIATIONS, PENN SOUTH PARENTS, CHELSEA-ELLIOTT TENANTS ASSOCIATION, COUNCIL OF CHELSEA BLOCK ASSOCIATIONS, KELVIN L. and ELLA MARIE KEAN, BEVERLY RUBIN and FRANCES LOPATIN,

Plaintiffs-Appellees

- against -

UNITED STATES POSTAL SERVICE and E.T. KLASSEN, individually and as Postmaster General,

Defendants-Appellants

C.A. Docket No.

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Appeal from an order of preliminary injunction of the United States District Court for the Southern District of New York.

BRIEF FOR APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHELSEA NEIGHBORHOOD ASSNS, et al.,
Plaintiffs-Appellees,

- v -

UNITED STATES POSTAL SERVICE, et al.,
Defendants-Appellants.

CA DOCKET NO.

BRIEF FOR APPELLANTS
UNITED STATES POSTAL
SERVICE AND E.T. KLASSEN

Statutes

National Environmental Policy Act,
42 U.S.C. § 4331 et seq.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall -

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

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(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local shortterm uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievabile commitments of resources which would be involved in the proposed action should it be implemented.
Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

Postal Reorganization Act, Title 39 U.S.C.

§ 410. Application of other laws.

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

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(b) The following provisions shall apply to the Postal Service:

(1) Section 522 (public information) section 3110 (restrictions on employment of relatives), section 3333 and chapters 71 (employee policies) and 73 (suitability, security, and conduct of employees), and section 5532 (dual pay) of title 5, except that no regulation issued under such chapters or sections shall apply to the Postal Service unless expressly made applicable;

(2) All provisions of title 18 dealing with the Postal Service, the mails, and officers or employees of the Government of the United States;

(3) Section 107 of title 20 (known as the Randolph-Sheppard Act, relating to vending machines operated by the blind);

(4) The following provisions of title 40:

(A) Sections 258a-258e (relating to condemnation proceedings);

(B) Sections 270a-270e (known as the Miller Act, relating to performance bonds);

(C) Sections 276a-276a-7 (known as the Davis-Bacon Act, relating to prevailing wages);

(D) Section 276c (relating to wage payments of certain contractors);

(E) Chapter 5 (the Contract Work Hours Standards Act); and

(F) Chapter 15 (the Government Losses in Shipment Act);

(5) The following provisions of title 41:

(A) Sections 35-45 (known as the Walsh-Healey Act, relating to wages and hours); and

(B) Chapter 6 (the Service Contract Act of 1965); and

(6) Sections 2000d, 2000d-1 - 2000d-4 of title 42 (title VI, the Civil Rights Act of 1964).

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ISSUES

I. Is the Postal Service exempted from the requirements of NEPA by virtue of 39 U.S.C. § 410?

II Did the District Court err in finding the Environmental Impact Statement inadequate?

III. Did the District Court err in denying the Postal Service's Motion to Dismiss plaintiffs' Clean Air Act claims?

Facts

On February 19, 1975, the United States Postal Service opened bids for construction of a postal vehicle maintenance facility (hereinafter referred to as "VMF" or "Morgan Annex VMF") on the northern perimeter of the Chelsea neighborhood in Manhattan, New York. The low bid was submitted by the Sovereign Construction Co. in the amount of $36,566,000.

Prior to the award of a contract, the District Court, Hon. Robert J. Ward, United States District Judge, rendered an opinion (Exh. MM)* upholding plaintiffs' claims that the National Environmental Policy Act, 42 U.S.C. §4331 et seq., applied to the Postal Service and that the Environmental Impact Statement (hereinafter "EIS") (Exh. A) filed by the Postal Service pursuant to 39 CFR §775.1 was inadequate. No opinion was expressed by the District Court

*All exhibit references are to the joint appendix.

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with respect to plaintiffs' claims under the Clean Air Act, 42 U.S.C. § 1557.

On February 28, 1975, the District Court entered an order pursuant to its opinion enjoining the Postal Service from awarding a contract for construction of the VMF and from commencing construction at the Morgan Annex site. (Exh. NN) The order also denied defendants' motion to dismiss the complaint or in the alternative for summary judgment.

The site for the VMF is one square block bounded by 28th and 29th Street and 9th and 10th Avenues. The VMF site is directly across 29th Street from the Morgan Postal Station* which is presently being refurbished and mechanized and will be a major general mail processing center for the New York Metropolitan Area. The VMF is to provide maintenance for trucks carrying mail to and from the Morgan Station and will contain parking space for 918 Postal Service Vehicles. The VMF will not have parking spaces for Postal Service employees nor for residents of the proposed housing units. Access to the VMF is limited to 29th Street, thereby shielding the community from the hazards of truck movement and noise. The

* On February 25, 1975 this Court affirmed the dismissal of a complaint in an action by a disappointed bidder for the Morgan Postal Station construction contract. Morgan Associates v. United States Postal Service, Docket No. 75-7058 (2d Cir. 1975).

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use of 29th Street between 9th and 10th Avenues will be reserved exclusively for the Postal Service.

The New York Metropolitan Area is served by more than 600 post offices and major stations grouped in 13 sectional center areas. It is the most complex segment and has the greatest mail volume of any postal system in the world. The plans for the Morgan Annex VMF and the modernization of the Morgan Station were drawn in recognition of the need for streamlining the system of mail delivery for the New York Metropolitan Area in light of these facts.

The Morgan Annex site had originally been acquired by the Post Office Department in 1968 as the site for a mail processing annex to Morgan Station. This plan was abandoned subsequently when the Postal Service decided to build a large bulk foreign mail processing facility in Seacaucus, New Jersey.

In the fall of 1971 Postal Service officials initiated a series of meetings at which New York City government officials and congressional representatives were informed of new plans. Aware that many local citizens and government officials desired that the site be developed for residential use, the Postal Service proposed

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to make air space above the VMF available for housing free of land cost.

At about the same time, an effort was begun in Congress to obtain legislation, through an amendment to public works legislation then under consideration, directing the Postal Service to donate the site to the City for use exclusively for public housing. This effort failed when a substitute amendment offered on the floor of the House of Representatives was adopted embracing the Postal Service plan. Enacted on June 16, 1972, as section 6(b) of Publi Law 92-313, "Public Buildings Amendments of 1972," 86 Stat. 216, the substitute legislation (Exh. C) directs the Postal Service to grant the City of New York, without reimbursement, the air rights above the postal facility to be constructed on the site and to design and construct the postal facility in such manner as to permit the building by the City of a high rise residential tower on top of the facility, provided that the City shall grant the Postal Service, without reimbursement, exclusive use of 29th Street between Morgan Station and the VMF site, shall agree to reimburse the Postal Service for the additional cost of designing and constructing the foundations of its VMF so as to render them capable of supporting a residential tower, and shall issue any permits, licenses, easements, and other authorizations necessary or incidental to the

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construction of the postal facility.

The Postal Service's cost and engineering feasibility study was presented to the City's Housing and Development Administration, Planning Commission, Manhattan Borough officials, and Fire Department in April 1972. On May 2, 1972, and again on May 17, 1972, the Postal Service's Board of Governors approved the VMF project. Throughout 1972, many meetings, discussions, and exchanges of correspondence took place between Postal Service officials and City residents and officials.

The New York District U.S. Army Corps of Engineers, commenced preparing an environmental impact assessment in the spring of 1972. On June 5, 1972, Postal Service and Corps officials met with representatives of the City's Department of Air Resources, Planning Commission, and Housing and Development Administration to discuss potential environmental impacts of the project. Similar meetings also were held about this time with the City's Department of Traffic, and the Postal Service began developing forecasts of truck volume and routings which would be necessary to serve Morgan Station.

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Several potential alternate locations for the VMF were considered during 1971 and the first half of 1972. All were rejected for economic or operational reasons or both. One alternative now forwarded by plaintiffs, The Yale Express Co. terminal, was not then available and did not become available until after the Final Environmental Statement was filed. But in any event, the Yale Express Co. terminal is entirely inadequate as an alternative and the Court below did not dispute that fact. (Exhs. B, B-1) Postal Service finally set a cut-off date of August 15, 1972, after which its commitment to development of the Morgan site would be considered firm and additional alternate sites would not be considered.

On September 11, 1972, the Postal Service directed the Corps of Engineers to prepare an Environmental Statement for the project pursuant to 39 CFR § 775.12.

Negotiations between the Postal Service and the City, which were stalled throughout the summer and early fall of 1972 over the issue of closing 29th Street to public traffic, finally commenced in earnest following a determination by the City Planning Commission in

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November 1972 that the existing street grid could absorb the vehicles that would be diverted from 29th Street between 9th and 10th Avenues. The Planning Commission on November 14, 1972, sent the Postal Service a draft agreement containing the general outlines of the arrangements to be made in furtherance of the project.

On November 27, 1972, the Postal Service directed the Corps of Engineers to select an Architect/Engineer (hereinafter A/E) firm to design the VMF, with participation from the City's Housing and Development Administration in the final A/E selection. On December 26, 1972, the Postal Service, noting that the A/E selection process had been substantially completed, directed the Corps to negotiate a contract and proceed immediately with the design of the project, and to furnish copies of the preliminary Environmental Statement as soon as available. The design contract was awarded by the Corps to Emery Roth & Sons, New York, on February 21, 1973.

Copies of the first draft Environmental Statement were released to the City and local interest groups in January 1973, and were discussed at a meeting of the Hudson Guild on February 12, 1973, attended by Chelsea residents, Postal Service regional representatives,

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and New York City's Commissioner of Air Resources. Comments, to be submitted by March 15, 1973, were requested of recipients of the draft Statement. Copies of the draft were furnished the Postal Service on March 9, 1973.

On April 5, 1973, the City and the Postal Service entered into a Memorandum of Understanding outlining the responsibilities and undertakings of both parties (subject, in the City's case, to prior approval of the City Planning Commission and Board of Estimate where applicable) in furthering the project. Among other things, the Postal Service agreed to:

> "Prepare and submit the required Environmental Impact Statement in accordance with the National Environmental Policy Act of 1969 and other applicable statutory provisions which statement shall satisfy both Federal and City criteria. The City will cooperate with the Postal Service in connection with the Impact Statement preparation and submission."

At an April 20, 1973, meeting with the design A/E, attended also by representatives of the City's Planning Commission and Housing and Development Administration, the Postal Service:

(A) Scheduled a meeting with the Mechanical Engineer for April 27, 1973, to discuss the environmental impact study and the responses received from various City and Federal agencies to the first draft;

(b) Disapproved a proposal to provide postal employee parking, stating that postal employees are to be encouraged to use the readily available public transportation for commuting to and from work;

(c) Directed the A/E to make a careful study of the noise levels at the base of the high-rise tower so that these levels would not violate standards set by City and Federal agencies; and

(d) Agreed to the Housing and Development Administrations's proposal that the residential tower be set back from the 9th and 10th Avenue faces of the VMF in order to prevent unacceptable levels of street noise in the lower housing units without necessitating central air conditioning in lieu of lower through-the-wall room air conditioners.

In June 1973 the Postal Service agreed reluctantly not to bridge over and enclose 29th Street as had been planned, in order to avoid a potential enviromental hazard. In transmitting to the design A/E the Postal Service's authorization to design the project without enclosing 29th Street, the Corps stated (letter dated July 2, 1973):

> It will be necessary for you to consult with Edwards & Kelcey and their consultants in the areas of noise control and air quality as required to insure the development of a concept design which will be acceptable to the appropriate environmental protection agencies. The acceptability of the project to the appropriate city agencies including the Fire Department and the Sanitation Department must be assured.

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A revised draft Environmental Statement was issued by the Corps of Engineers on November 28, 1973, and comments were requested from all concerned Federal, State, Regional, City, and Community agencies and organizations. Forty-five days were allowed for receipt of such comments initially. This period subsequently was extended to March 23, 1974. The Final Environmental Statement (Exh. A.) dated March 26, 1974, was published by the Council on Environmental Quality (hereinafter CEQ) on April 8, 1974. 39 Fed. Reg. 12783. The distribution given the Final Statement and a summary and critique of the comments received following issuance of the revised draft Statement are set out in the Final Statement.

All responsibility for the project was turned back to the Postal Service by the Corps of Engineers in July 1974. Until November 1974 the responsibility for design and construction of the housing portion of the project was in the New York State Urban Development Corporation (UDC). UDC had indicated the original plans for construction of two residential high-rise towers may be abandoned in favor of construction of one tower.

On November 18, 1974 the Postal Service advertised for bids on the construction of the VMF. The work was estimated to cost between $27 and 37 million. Bids were

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opened on February 19, 1975. Sovereign Construction Co. submitted the low bid in the amount of $36,566,000. The bids for the VMF will expire on April 21, 1975. It is estimated that any rebidding would cost the Postal Service approximately $10,000 per day at present inflation rates.

On November 19, 1974 at a meeting of representatives from the community, the New York City Housing Development Administration, the New York City Planning Commission, the New York State Division of Housing and Community Renewal, the architectural firm Gruzen and Partners and the Postal Service it was announced the UDC would no longer be responsible for the housing portion of the Morgan Annex. New plans call for long-term low interest mortgage financing by the New York State Division of Housing and Community Renewal upon the application of a private regulated housing corporation to be the project's sponsor. (See Exhs. D and G.)

Although no formal application had been made, funds had been set aside in May of 1974 by the Department of Housing and Urban Development for 900 units of low income housing under the revised section 23 program of the Housing Act of 1937 for the Morgan Annex in the event that a formal application would be submitted and approved. UDC did submit an application for funding under a different provision of the Housing Act but the application was returned for lack of funds. As of January 1, 1975 revised

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section 23 was supplanted by Section 8 of the Housing and Community Development Act of 1974, 42 U.S.C. §1437 (f). The Secretary of HUD is now considering whether funds previously set aside for revised Section 23 housing will be transferred to Section 8 housing. No formal application for Section 8 housing has been received by HUD. (Exh. F) Under HUD's proposed regulations a Statement in compliance with NEPA would have to be prepared under HUD auspices prior to release of funds under a Section 8 grant. Proposed Rule § 1278.310(d) Department of Housing and Urban Development, Office of Low Rent Public Housing Assistance Payment program - State Housing Finance and Development Agencies, 39 Fed. Reg. 42754, 42761 (Dec. 6, 1974) referring to 38 Fed. Reg. 19182 (July 18, 1973) which makes effective HUD's Handbook 1390.1 "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality," as amended at 39 Fed. Reg. 38922 (Nov. 4, 1974).

The present architectural plans for the housing above the Morgan Annex are at a very tentative stage. (Exh. E) It is not known whether there will be one or more towers. While the foundations plans are firm, there remains flexibility with respect to number of units

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and size and shape of the buildings to be constructed above the VMF. The only specific community-approved plans concern the southern portion of the VMF bordering on 28th Street.

POINT I

Section 410 of the Postal Reorganization Act Exempts the Postal Service from the Requirements of NEPA.

The District Court incorrectly found that NEPA applied to the Postal Service. (Opinion at 7-14) The expressed reasons were: (a) the language of 39 U.S.C. § 410 does not prohibit the application of NEPA to the Postal Service; (b) the legislative history of the Postal Reorganization Act (Title 39, United States Code) does not reveal a national policy inconsistent with NEPA, and (c) two cases, City of Thousand Oaks v. United States, unreported, Docket No. 74-2685 (9 Cir. Oct. 1, 1974) (Annexed hereto) and Maryland National Capital Park and Planning Comm'n v. United States Postal Service, 487 F.2d 1029 (D.C. Cir. 1973) "suggest" and "buttress" the conclusion that NEPA applies to the Postal Service.

The District Court was incorrect as a matter of law in respect to each reason given for holding that NEPA applies to the Postal Service, except that the Postal

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Service concedes that the language of NEPA alone, without 39 U.S.C. § 410, would require the Postal Service to file an environmental impact statement as to the VMF portion of the Morgan Annex Project.* It is not contested that the VMF portion falls within the meaning of a major federal action significantly affecting the environment, for purposes of 42 U.S.C. § 4331(c).

The Postal Service, at the same time, is not oblivious to the national environmental considerations; it recognizes its responsibilities to act in due consideration to other factors. The Postal Service has promulgated regulations in this regard. These regulations note that while NEPA is not binding on the Postal Service, the Postal Service will endeavor to comply voluntarily with the NEPA procedures whenever feasible. 39 CFR § 775.1.**

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* Thus, although the Postal Service is no longer an Executive Agency under 5 U.S.C. § 101 et seq., but for 39 U.S.C. § 410 it would still be a federal establishment and subject to NEPA's mandate that "all agencies ... file environmental impact statements for major federal actions significantly affecting the environment. Cf. Mittenberger v. Chesepeake and Ohio Railroad Co., 450 F.2d 971 (4th Cir. 1971) pertaining to Amtrack which is "not an agency or establishment of the United States" (at 974-5).

** 39 CFR § 775.1 provides:

§ 775.1 Purpose and Policy.

(a) The National Environmental Policy Act of 1969 (42 U.S.C. §4321-4347), as implemented by Executive order 11514 and the Council on Environmental Quality's Guide-

(Footnote continued)

lines of April 23, 1971 (36 F.R. 7724), requires preparation of detailed environmental impact statements on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. The objective of the Act is to build into the agency decisionmaking process an appropriate and careful consideration of all environmental aspects of proposed actions.

(b) To the extent that the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321-4347), the Clean Air Act, as amended (42 U.S.C. 1857-1857 1), the Federal Water Pollution Control Act, as amended (33 U.S.C. 1150 et seq.), the Solid Waste Disposal Act (42 U.S.C. 3251-3259), the Atomic Energy Act, as amended (42 U.S.C. 2011-2296), the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 135 et seq.), the Rivers and Harbors Act of 1899, as amended (33 U.S.C. 401 et seq.), and other Federal antipollution acts, are Federal laws "dealing with public or Federal contracts, property, works, *** budgets, or funds" within the meanings of section 410(a) of title 39, United States Code, they, and any Executive orders or other regulations based upon them are inapplicable to the exercise of the powers of the Postal Service. However, it is the policy of the Postal Service to comply voluntarily with such statutes, orders and regulations (including all State and local requirements made applicable to Federal agencies by virtue of, or pursuant to, Federal statutes) to the extent practical and feasible consistent with the public interest and fulfillment of the primary mission of the Postal Service. The foregoing general policy will be implemented in accordance with the following:

(1) At the earliest practicable stage in the planning process, the environmental consequence of any proposed major action shall be assessed.

(2) Actions that were initiated prior to the enactment of the National Environmental Policy Act of 1969 and for which the environmental consequences have not been assessed shall be reviewed to insure that any remaining action is consistent with the provisions of this Part 775.

(Footnote continued)

(3) Insofar as practicable, and with appropriate consideration of assigned functions and of economic and technical factors, programs and actions shall be planned, initiated, and carried out in a manner to avoid adverse effects on the quality of the human environment. When this is not feasible, all reasonable measures shall be taken to neutralize or mitigate any adverse environmental impact of the actions.

(4) Whenever an environmental assessment of a proposal for legislation, or of a proposed or continuing major action, indicates under the criteria contained herein that the resulting action may significantly affect the quality of the human environment or may be highly controversial with regard to environmental impact, a detailed environmental impact statement shall be prepared and processed pursuant to the guidance herein contained or referenced.

(c) The regulations embodied in this part, adopted in furtherance of the policy of voluntary compliance outlined in paragraph (b) of this section, shall not be deemed to be a consent to suit by a party outside the Postal Service and are not enforceable against the Postal Service is authorized to use the mere noncompliance with these regulations against the Postal Service in any manner.

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On August 12, 1970, the Congress enacted Pub. L. 91-375, the Postal Reorganization Act, Title 39, United States Code. The Postal Reorganization Act includes a provision that "no Federal Law dealing with public or federal contracts, property, works, officers, employees, budgets or funds, including provisions of chapters 5 and 7 of Title 5, shall apply to the exercise of the powers of the Postal Service." (39 U.S.C. § 410). Certain exceptions are listed to this exemption of the Postal Service (§ 410(b), but the National Environmental Protection Act ("NEPA") is not included. The omission of NEPA from the listed exceptions is particularly significant since NEPA was enacted prior to the Postal Reorganization Act. Pub. L. 91-190, January 1, 1970 (42 U.S.C. § 4321). It must be assumed that Congress was aware of NEPA's existence when the exceptions to the exemption of 39 U.S.C. § 410 were considered. By not including NEPA in the exceptions, the Congress exempted the Postal Service from the requirements of NEPA.

(a) The Language of 39 U.S.C. § 410 Prohibits the Applicability of NEPA to the Postal Service.

The District Court's analysis of the language of of Section 410(a) was inaccurate and strained. Section

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410(a) exempts the Postal Service from all "Federal law[s] dealing with public or Federal contracts, property, works, officers, employees, budgets or funds..." (emphasis added) Congress' choice of "dealing with" emphasizes the broad-ranging nature of the exemption. It evidences an intent to exempt not only legislation the principal purpose of which was to regulate the enumerated areas, but also laws enacted for some other purpose but which would incidentally also effect the operation of the Postal Service in these areas. Thus, while Judge Ward was correct that "contracts, property, works ... budgets or funds" are words of limitation, he erroneously concluded that since NEPA did not directly regulate the enumerated areas NEPA was not exempted by Section 410. Plainly NEPA does directly deal with major federal contracts, property and works. Regardless, the Postal Service contends that the District Court's finding that the "contracts, property, employees and funds may be incidentally involved in 'action' subject to NEPA" (opinion at 12) is sufficient to bring NEPA within the 39 U.S.C. § 410 exemption.

Moreover, the reference to "including the provisions of Chapters 5 and 7 of Title 5" in Section 410(a) evidences the broad reach of the exemption; and does not act, as the District Judge found, to "preclude including

other statutes of general applicability [such as NEPA] not specifically named or described in [39 U.S.C. §410.]."# (opinion at 13).

Judge Ward over-looked the fact that 5 U.S.C. §559 requires a specific and express exemption of an agency from Chapters 5 and 7 but that there is no such requirement in NEPA. The actual language of 39 U.S.C. § 410 exempts the Postal Service from all federal laws dealing with contracts, property, works etc. including those portions of the Administrative Procedure Act pertaining to internal agency procedures and judicial review. Those provisions by their general nature affect contracts, property, works etc. only in the most incidental way. By referring to those provisions in the APA as laws to be included among those which deal with contracts, property, works etc. the Congress was making explicitly certain that Section 410 should be given the broadest possible interpretation. And if the APA is included among those laws "dealing with ... contracts, property, works, etc.," NEPA certainly is also included.

A brief look at NEPA itself reveals that NEPA certainly does "deal with" "contracts, property, works, ... budgets, or funds" within the meaning of 39 U.S.C. § 410.

Judge Ward's conclusion is erroneous in light of the legislative history set forth below which could not be more explicit in expressing the Congress' intent to exempt the Postal Service from laws of general applicability

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NEPA requires all federal agencies to prepare environmental impact statements in connection with any "major Federal actions significantly affecting the quality of the human environment." This "Court-enforced full disclosure" statute (F. Anderson, NEPA In the Courts, A Legal Analysis of the National Environmental Policy Act vii (1973)) deals with contracts, property, works, budgets and funds no less than 15 U.S.C. § 77j and Rule 10(b)-5 deal with economics, financing and the stock market. The entire thrust of NEPA is to assure that major federal actions are commenced with opened eyes; and federal actions presuppose contracts, property, works, etc.

While the District Judge's analysis might have some persuasion if the statute had exempted the Postal Service from laws dealing with contracts, property, work, etc. and the APA; the exemption is not so framed. Rather the statute makes the APA "includ[ed]" within the larger exemption of laws "dealing with Contracts, etc." If reference to the APA in this manner has any bearing on the applicability of NEPA, the reference evidences the broad nature of the Section 410(a) exemption and suggests that NEPA does not apply to the Postal Service.

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(b) The Legislative History of the Postal Reorganization Act Reveals A National Policy Inconsistent With NEPA.

When enacting NEPA, prior to passage of the Postal Reoganization Act, the Congress was cautious to note that the policies of NEPA should be carried out "consistent with other essential considerations of national policy." 42 U.S.C. § 4331(b). The House and Senate Reports and the floor debates at the time the Postal Reorganization Act was being considered are replete with evidence that the Postal Reorganization Act embodies policies not consistent with NEPA.

The Senate Report No. 91-912, 91st Cong. 3d Sess. 2 (1970) summarized the need for major reforms in the Postal Service:

> "The committee's inquiries and every responsible study show that the Postmaster General is blocked or undercut at every turn by a labyrinth of Postal statutes echoing every postal concern, interest, or whim expressd by Congress over a 200-year period. Laws have changed laws and have added to the body of them so that, by accretion, they have multiplied decade by decade leaving the Postmaster General bound in his own house. Twist and turn as he may, he cannot function in the public interest as a responsible manager."

The Postal Reorganization Act extricated the Postal Service from the maze of bureaucratic requirements

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in two ways. First it removed the Postal Service from the inhibitive machinations of politics. Second it enabled the Postal Service to conduct its business in an economical manner. Congress provided that the Postal Service would no longer be a cabinet-level department (5 U.S.C. § 101) and that it would be an independent establishment of the executive branch. It enabled the Postal Service to conduct its business economically by providing that the new Postal Service would have general powers to operate in "a business-like way." H.R. Rep. No. 1104, 91st Cong., 2 Sess. 5 (1970). The legislative history contains countless explicit statements that the proper functioning of the Postal Service in every area was being readily defeated and frustrated by bureaucratic delays.* It is this consideration which Judge Weinfeld found persuasive in holding the Price Commission was not subject to the requirements of NEPA. Cohen v. Price Commission, 337 F. Supp. 1236 (S.D.N.Y. 1972). In that case, Judge Weinfeld carefully considered "evidence that Congress intended no hindrance to expeditious action" by the Price Commission in deciding the applicability of NEPA. Indeed the gravamen of Judge Weinfeld's decision was the need for expedition and not that the Price Commission was a temporary agency, although Judge Ward distinguished the Postal Service on that ground. Further the Economic Stablization Act, like the Postal Re-

* See Morgan Associates v. United States Postal Service, supra.

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organization Act, provided no explicit exemption from NEPA.

The following are only a few examples of the endless available citations that the Congrss intended to exempt the Postal Service from laws generally applicable to other Government agencies because they are a hinderance to expeditious action by the Postal Service:

> "Federal statutes relating to contracts, employment policies, apportionment of appropriations, the development and submission of budgetary requests to Congress for its consideration, and the acquisition and disposition of real and personal property impose restrictions which in our view are not desirable if we intend to operate the Post Office as an independent public service agency of the Government. Laws which are appropriate to government management generally, which insure compliance with policies which Congress has determined to be in the best public interest for Government agencies generally, are not the best method of control in the case of the post office. They have proven to be a hindrance to postal modernization. *** Except as specified in the bill, all laws relating to public works, contracts, employment, appropriation, budgeting, and any other laws governing agency operations are made inapplicable to the Postal Service." Senator McGee 116 Cong. Rec. 21709 (1970) (emphasis added).
>
> "The Board of Governors shall have broad authority and shall not, except as specified be subject to Federal laws dealing with contracts, property, the civil service system, the Budget and Accounting Act of 1921, apportionment of funds, and other laws which in most instances apply to Government agencies and functions." S. Rep. No. 912, at 5 (emphasis added.)

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> "Section 410 of Title 39 *** says that no law is applicable to the Postal Service unless it is set out in title 39 or unless the law is made specifically applicable to the Postal Service." 118 Cong. Rec. S10024 (daily ed. June 22, 1972).

To the extent that prior postal laws impede economic efficiency, Title 39 itself acted to repeal them.

But the Congress was not satisfied that repeal of postal laws alone would suffice to improve the Postal Service's efficiency. Section 410 was included specifically to relieve the Postal Service from the restrictions of all federal laws dealing with contracts, property, works, etc., as explained above. Non-postal laws applicable to government agencies generally could not be repealed because they were intended to continue in effect to other federal agencies. Moreover, those laws were too numerous to detail. The only effective way to relieve the Postal Service from the non-postal laws which were sources of restrictions on the management of the business operations of the Postal Service was by enactment of Section 410. That section, as indicated, makes all but a specified few statutes inapplicable to the Postal Service. NEPA is not one of those specified few which are excepted from Postal Service exemption.

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While NEPA does not appear to have been explicity considered in the course of the debates, hearings and reports, the range of the Section 410 exemption was made clear in the course of debates on other hypothetical situations. Thus in hearings before the Senate Committee on Post Office and Civil Service on reorganization of the postal establishment to provide for efficient and economical Postal Service, the following exchange took place concerning the possible effect that a general cut in federal spending might have on the Postal Service regardless of the purpose for such a cut:

> Mr. Blount: We don't believe, Senator, that this kind of order would apply to us. That order, as you know, was in connection with Federal funds, all Federal funds.
>
> Senator Bellmon: And when the President announced a cutback in Federal spending you would be exempt.
>
> Mr. Blount: Yes sir.

(Postal Modernization, Hearings, 91st Cong., 1st Sess. 260 (1969)).

Further evidence that the Section 410 exemption included NEPA is found in legislative proceedings subsequent to the enactment of the Postal Reorganization Act. Upon learning of the Postal Service's interpretation

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that it is exempted from the requirements of NEPA, a bill was submitted by Congressman Keating in the House or Representatives to amend Section 102(2)(c) of NEPA and Section 410(b) of the Postal Reorganization Act so as to except NEPA from the Section 410(a) exemption, thereby making NEPA applicable to the Postal Service. H.R. 9855, 93rd Cong. 1st Sess. (1973) (See Mr. Keating statement: 119 Cong. Rec. e 5386 (daily ed. Aug. 3, 1973)). That bill was not enacted. A similar fate befell proposed amendments to the Occupational Safety and Health Act of 1970 Section 18, 29 U.S.C. § 668 (H.R. 12379, 93rd Cong. 1st Sess. (1973)); and the Small Business Act, 16 U.S.C. § 631 (H.R. 16687, 93rd Cong. 2d Sess. 1974) which would have made those statutes applicable to the Postal Service had they been enacted. By contrast, Congress has specified in at least two statutes enacted after the Postal Reorganization Act that the Section 410 exemption is not controlling: a statute concerning withholding of City income tax, Pub. L. 93-40 (July 10, 1974); and the Noise Control Act of 1972, Pub. L. 92-574 § 3(1a), 86 Stat. 1235. It is particularly significant that Congress has singled out the Noise Control Act of 1972 to be made applicable to the Postal Service, unlike NEPA or the Clean Air Act. This demonstrates that in certain environmental matters, when the Congress has determined

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that Postal efficiency should be subservient to environmental needs, the Congress so specifies by explicit reference to 39 U.S.C. §410.

In light of the legislative history it is evident that the Congress intended to exempt the Postal Service from the procedural requirements of NEPA.

(c) The District Court Incorrectly Applied Existing Case Law On This Issue

Only one court has squarely decided this issue. City of Thousand Oaks v. United States of America, _____ F. Supp. _____ (C.D. Cal. Sept. 3, 1974) held that NEPA did not apply to the Postal Service on the grounds that "Congress considered the Postal Service as an unique governmental agency desperately in need of improvement and intended that it should be free of may of the usual obstacles facing most agencies." (Copy of opinion is attached.) On appeal the Ninth Circuit wrote cryptically "We do not approve the basis upon which the trial court dismissed, but we affirm that judgment," (_____ F.2d _____ (October 1, 1974) also attached). The Ninth Circuit held the Postal Service's statement that there would be no significant environmental impact was adequate.

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The Ninth Circuit's decision is entirely uninformative and is of no precedential value in this case. One reason is that the Court may have decided to "not approve the basis upon which the trial court dismissed" on grounds other than disagreement with the applicability of NEPA to the Postal Service.

An examination of the briefs on appeal in City of Thousand Oaks reveals that the appellants had argued inter alia that even if the Postal Service was exempt from NEPA by virtue of Section 410, the facts of that case required an impact statement to be filed because of the involvement of non-exempt agencies in the project. The complaint in that case charged that both the "Controller [sic] General of the United States and the United States General Accounting Office was [sic] active for and on behalf of the U.S. Postal Service relative to this acquisition of the parcel of property for the proposed post office" and the "Defendant Army Corps of Engineers ... is responsible for the construction of certain public facilities, including post office facilities, when requested by U.S. Postal Service. Said Corps of Engineers was responsible for the preparation of design documents and environmental evaluation for the proposed post office facility." The Comptroller, GSA and the Corps were all

named as defendants in City of Thousand Oaks. The order of the Ninth Circuit, without further explanation, leaves to surmise whether it did not approve the basis of the District Court's decision because it disagreed or because if found the issue of NEPA's applicability to the Postal Service was unnecessary to reach.

In this action by contrast there are no averments concerning the Comptroller or GSA and the only allegations concerning the Corps of Engineers appear at paragraphs 26 and 27 of the complaint that the Postal Service arranged through the Corps to prepare an impact statement, (Exh KK) which was done. As indicated in the defendant's Answer (paragraphs 9, 10), (Exh LL) the preparation and issuance of the impact statement was done through the Corps, in accordance with 39 CFR § 775.12. The Corps here has no responsibility for the construction of the Morgan Annex VMF. Indeed the total lack of any involvement by the Corps other than as set forth in 39 CFR § 775.12 is evidenced by plaintiffs' decision to not name the Corps as a defendant. Moreover, the sole basis for relief below is that the Postal Service itself is obliged to file an Environmental Impact Statement.

In view of the Ninth Circuit's summary treatment of the City of Thousand Oaks and in view of the possible separate basis for not approving the basis upon which the trial court dismissed the action, Judge Ward was incorrect

in saying that the City of Thousand Oaks Court of Appeals decision even "suggests" that Section 410 does not render NEPA inapplicable.

Similarly, Judge Ward erroneously found that Maryland - National Capital Park and Planning Commission v. United States Postal Service, 487 F.2d 1029 (D.C. Cir. 1973) "buttressed" the view that the Postal Service was not exempt from NEPA. Not only did the D.C. Circuit fail to discuss the issue in its decision; the Postal Service never briefed the 410 exception claim. In the Maryland case the Corps of Engineers was involved in the construction of the Postal facility; here, by contrast, the Corps of Engineers was never responsible for construction.

Accordingly neither the Ninth Circuit nor the D.C. Circuit decisions have any precedential value whatsoever in this action. Other than the court below, the only court to have resolved this issue was the California District Court which determined that the Section 410 exemption precluded application of NEPA to the Postal Service.

(d) Other Reasons Why NEPA Should Not Apply to the Postal Service Not Considered By the District Court

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There are additional reasons why NEPA should not apply to the Postal Service briefed below but not discussed by the District Court.

First, a judicial determination in favor of the applicability of NEPA to the Postal Service in the face of the language of Section 410 and the legislative history surrounding Title 39 would serve to create delays and uncertainties within the Postal Service in regard to this and other major plans and projects aimed at reorganizing, revitalizing and streamlining the service of mail delivery. The time required to follow NEPA procedures for preparation, publication, commenting and revising environmental impact statements account for months and possibly years. If challenged by lawsuits for adequacy of the statement, the attendant delays are impossible to predict. In a project where the low bid is $36,566,000 for construction alone (there are additional archietect/ engineer costs, support costs, etc.) such as this, the delay of even one month may amount to an increased cost of as high as $370,000 at present inflation rates; result in cancellation of contracts after bids have been opened and accepted; or even cause the determination of a desperately needed project. The jobs that would be provided by a project of this size, also desperately needed in this time of increasing unemployment, will not be available if the project is forced to be abandoned.

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Moreover, a decision holding NEPA applicable to the Postal Service will serve as precedent to undercut the purposes of Section 410. Statutes now construed to be inapposite to the Postal Service under 39 U.S.C. § 410 but which may become subject to attack include the following: Federal Advisory Committee Act, Pub. L. 92-463, 5 USCA App. ____; Title VII of the Housing and Urban Development Act of 1970; National Historical Preservation Act of 1966, 16 U.S.C. § 470 et seq.; Historic Sites Act of 1935, 46 U.S.C. § 461 et seq.; The Antiquities Act of 1906 16 U.S.C. § 431 et seq.; Small Business Act 16 U.S.C. § 631 et seq.; Section 808 of the Fair Housing Act, 42 U.S. § 3608(d); Section 503(a) of Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 29 U.S.C. § 701 et seq. (Supp. III, 1974); Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646; Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4231. The potential precedential effect of a holding that NEPA applies to the Postal Service cannot be measured; but it is plain that it would threaten to undo the Congressional grant that freed the Postal Service from the labyrinth of bureaucratic tangles that typified the Postal Service's past.

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POINT II

The District Court Erred In Concluding The Environmental Impact Statement was Inadequate

The District Court found the Environmental Impact Statement prepared on behalf of the Postal Service for the proposed VMF to be inadequate in essentially three ways: (A) it failed to discuss in detail the possibility that the housing portion may not be built (B) it failed to adequately consider the impact that the housing portion of the Morgan Annex project will have on the community; (C) it failed to consider the possible alternatives of "no action" and "scatter sites". In all these regards, even if NEPA does apply to the Postal Service, the District Court's findings were erroneous, requiring reversal of the order of preliminary injunction.

The Final Environment Statement of the Postal Service concerning the VMF is attached as Exhibit A. The standard for review of this document is whether the Postal Serivce was arbitrary or capricious and abused its discretion. Hanly v. Kleindeinst, 471 F.2d 823 (2 Cir. 1972), cert. denied, 412 U.S. 908 (1923); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Or. 1971). The court's function is not to rule on the relative merits of competing scientific opinion; it is merely to assure that

competing views are set forth and not arbitrarily omitted. Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971). It is well settled that the Court may not substitute its view in favor of the agency's on the desirability of the project.

Appellants contend that the District Court erred in concluding that the plaintiffs established a likelihood that they would succeed on the merits. The EIS contains a detailed analysis of the projected impacts that the VMF will have on the community and it is entirely reasonable for the Postal Service to proceed on the basis of the considerations contained therein.

(A) The Environmental Impact Statement Is Adequate Even If Housing Is Not Constructed.

While the District Court found the EIS to be inadequate for failure to consider housing and alternative sites, the District Court found no deficiency in the EIS's evaluation of the impact of the VMF alone on the environment. The District Court opinion upholds none of plaintiffs' arguments below that the EIS is inadequate in terms of its analysis concerning air and noise pollution. Nonetheless the District Court held that failure to consider the possibility that housing may not be built was a "significant" omission, "render[ing] the impact statement inadequate." (Opinion at 16). In this context, the Court also found the EIS to have failed to respond to comments of various agencies (Opinion at 17).

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The flaw in the District Court's reasoning is that there is not one single area of impact left to be analyzed as to the effect that the VMF will have on the environment even if housing is not built. In both the EIS itself and in the papers submitted below in opposition to plaintiffs' motion for preliminary injunction, the Postal Service presented a detailed scientific analysis rebutting plaintiffs' allegations concerning noise and air pollution from VMF. The evidence establishes that construction and operation of the VMF will not exacerbate the present air pollution conditions. Indeed, the rate of improvement will be about the same with or without the VMF; and carbon monoxide emissions will, in fact, be reduced with completion of the VMF. Similarly the EIS fully and accurately discloses and discusses the noise impact that the VMF will have on the environment. Indeed, Judge Ward found nothing unreasonable in the EIS analysis of these matters. His only comment was a passing reference to treating the VMF without housing as a temporary condition, which hardly rises to the level of unreasonableness required for a finding that NEPA has been violated under Hanley v. Kleindeinst, supra

Moreover, as explained below in the discussion on alternative sites, the Postal Service, even prior to passage of Pub. L. 92-313, determined as a matter of operational efficiency there was a need in the New York Metropolitan Area for a consolidated garage with

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repair facilities for postal vehicles. The economic studies undertaken both by the Postal Service and the Congress supported the Postal Service's initial views that from an financial viewpoint, it would be more economic to have a Postal owned and constructed garage than a leased site. With the modernization and refurbishing of the Morgan Station now under way, the advantage of having the VMF located close to the new processing facility is self-evident. The proposed VMF is located on the block adjacent to the Morgan Station.

Having found no error in the EIS's evaluation of the VMF's impacts, it was plainly arbitrary for the court below to enjoin construction of the basis of an omission in the EIS to consider the VMF without housing.

Moreover, the fact that the EIS considered the potential beneficial aspects of the needed housing was itself not unreasonable. Pub. L. 92-313 mandates the grant of air rights to the City for purposes of constructing housing. When the EIS was prepared there was -- and there remains -- active community interest in obtaining housing above the VMF. At the time the Statement was prepared, HUD had set aside funds under Section 23 for purposes of subsidizing rentals in the housing project. HUD is now actively considering transferring those moneys to the Section 8 regulations which

supplanted Section 23. (Exhibit F). The State Division of Housing and Community Renewal has indicated it "would be receptive to financing a project on the site" upon application of a qualified sponsor. (Exhibit G). Chelsea - Morgan Housing Association, Inc. is a sponsoring group which currently intends to submit an application for such financing. (Exhibit D). Indeed, they have designated an architect to draw the design for the residential units. (Exhibit E). The Postal Service was thus entirely justified in proffering the housing as an advantage of the Morgan Annex Project.

In writing "there is no discussion as to whether the cost of providing these noise reducing features [such as air-conditioning] will render the development of low - and moderate - income housing economically unfeasible" (opinion at 16) Judge Ward ignored entirely the analysis in the EIS at pp VIII-3 and VIII-27 to 28. The EIS there noted that by setting back the housing and by using window units rather than central air conditioning, permissible noise levels could be achieved at economically feasible costs.

Similarly, Judge Ward's conclusion that there was no "meaningful response" to the comments of other agencies concerning the possibilities that the housing may not be built is factually incorrect. The District Court totally disregarded the candid acknowledgment in the EIS at VIII-4

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that the original EIS misrepresented the status of financing for the housing; noting that HDA financing was conditional upon HUD subsidies. With respect to HUD's request for a discussion of ventilation of the VMF without housing, a discussion appears in response at VIII-18 and C-30.

If this Court agrees that the District Court was in error in finding that the EIS was inadequate in other respects, appellants request this Court, for the sake of expedition and to avoid unnecessary and costly delays, to either (1) determine on the merits that it was an abuse of discretion to enjoin construction on this ground, or (2) instruct the District Court to permit the Postal Service to present directly to the Court below an analysis and conclusion with respect to proceeding with the VMF even if housing will not be built, without requiring the Postal Service to seek comments from the public and other agencies.

(B) The Housing Above The VMF Was Congressionally Segmented From The VMF; And The EIS Evaluation Of The Housing Was Appropriately Limited

The District Court found the EIS to be inadequate for failure to consider the environmental impact of the housing. (Opinion at 18 et seq.)

The Court wrote that design and construction of the VMF is determinative of the configuration of the housing and forecloses building housing at ground level.

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These characterizations of the facts are at variance with the facts as alleged by the Postal Service in its 9(g) Statement and the affidavit of the architect for the housing. Defendants' 9(g) statement asserts that "these foundation plans do not predetermine the size, shape or design of the residential units or of the towers." (Exh. U) Plaintiffs offered no evidence to the contrary nor did they affirmatively contradict that fact, except to assert in an opposing (9g) statement that this issue was in dispute. (Exh. GG) To have resolved this issue in plaintiffs' favor without a hearing on the basis of these conflicting 9(g) statements was clear error. Socialist Workers Party v. Attorney General of the United States of America, ___ F.2d ___ Docket No. 74-2640 (2 Cir. Dec. 24, 1974), application for stay denied, ___ U.S. ___ (Dec. 27, 1974), (Marshall, J.). See also Corwin Consultants, Inc. v. The Interpublic Group of Companies, Inc., _____F.2d _____, Docket No. 74-1778 (2 Cir, March 4, 1975). Indeed, the affidavit of William D. Wilson (Exh E) avers that the design plans are tentative, indicating the flexibility asserted by defendants. Moreover, plaintiffs themselves offered at oral argument design sketches, approved by the community (Exh. V referred to in Exh. E para. 3) which reveal flexibility for the housing even if the VMF is constructed as planned. Indeed, these community approved plans call for housing at ground level, flowing over from the top of the VMF to the street.

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The District Court held that the Postal Service made no attempt to comply with the CEQ Guidelines, 40 C.F.R. § 1500.7(b) which state that an EIS "should contain an environmental assessment of the full range of federal actions involved, should reflect the views of all participating agencies, and should be prepared before major or irreversible actions have been taken by any of the participating agencies." Specifically the Court noted absence of HUD environmental clearance for this project.

It is evident that the District Court misconstrued the uncontested factual posture of the housing plans; or, at least, misinterpreted the legal significance of the factual setting.

The undisputed facts are that the present plans for the housing units on top of the VMF are at a "very tentative" stage (Wilson Affd, Exh. E.) While the VMF design plans do provide for foundations for a residential high rise complex this is nothing less than Section 6(b)(1)(B) of Pub. L. 92-313 requires. (Exh. C). Moreover it does not bind the housing plans to construction of a particular number of housing units nor to a particular design (Exh. U ¶ 8). Provisions for such foundations in the Postal Service's design were the consequence of discussions with local governmental and community groups and then-current plans for the design of the housing

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portion. As indicated, during the interim period when it appeared that UDC would sponsor the housing, those designs were changed from two towers to one tower. It now appears that some variation on the original plans calling for two towers will be adopted.

The effect of the District Court opinion is to enjoin the Postal Service from construction of the VHF either until the housing plans are finalized or until the Postal Service has evaluated every possible environmental impact that each potential variation in design and size of the housing may have on the community.

NEPA requires neither such waiting nor such speculation under the facts of this case. Here, there is specific congressional authorization for the Morgan Annex to be divided into two projects -- one a postal vehicle maintenance facility and one a residential housing project; the responsibility for one project falls to one agency of the federal government and the other to the City of New York; the city has permitted a State agency to take responsibility for funding of the housing, which in turn may seek federal assistance in the form of rent subsidies from a second federal agency not responsible for the VHF; that second federal

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agency itself will require compliance with NEPA before releasing funds for the housing; and the plans for the housing are "very tentative" while the contract for the VMF is ready to be awarded.

The Congressional requirement that the Postal Service grant the air rights for the Morgan Annex to the City of New York (Pub. L. 92-313 (Exh. C)) excuses the Postal Service from responsibility for evaluating the impact of the housing portion of the VMF. As Senator Javits wrote in the context of urging complete consideration of alternative sites: "I certainly understand that indecision among New York City agencies cannot be allowed to postpone the Postal Service's decision indefinitely." (Exh. L. - letter to Postmaster General from Sen. Javits, June 22, 1972). This case presents the unique situation of a Congressionally-segmented project, responsive to two separate needs. This is unlike the cases in the Ninth Circuit concerning Highway I-90 where the highway is arbitrarily divided into separate segments in an effort to obtain federal monies. Cf. Keith v. California Highway Comm'n., 506 F.2d 696 (9 Cir., 1974); see also Citizens for Balanced Environment and Transportation v. Volpe, 503 F.2d 601, 605 (2 Cir. 1974) (Winter, dissenting); Conservation Society of Southern Vermont v. Secretary

of Transportation, ___ F.2d ___ (2 Cir. 197). Nor is it like the rebuilding of a lock and dam by a single federal agency when the responsible agency does not reveal that the action may be "the first step in a system-wide improvement of the Upper Mississippi and the Illinois Waterway." Atchison, Topeka and Santa Fe Railway Co. v. Callaway, 382 F. Supp. 610 (D.D.C. 1974). In those cases, it is plain that NEPA "requires Courts [to] guard against an agency's considering only the immediate impact of the first step in a program." (Id. at 621).

Here, by contrast, the Postal Service has been specifically directed to give up all rights and interest above the Morgan Annex and to grant the air rights to the City of New York for purposes of building public housing. If the City determines to not construct housing, the Postal Service is not precluded from building its VMF. Indeed, the air rights will revert to the Postal Service within five years if no housing is built. The Postal Service need not await that eventuality before it is entitled to construct its VMF. Plaintiffs' argument and the Court's analysis would compel such contingent waiting; a result both antithetical to Pub. L 92-313 and the purpose of the Postal Service Reorganization Act and not required by NEPA.

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It is well settled that NEPA itself imposes no duty on non-federal entities to perform any particular activity. 42 U.S.C. § 4332(2); See Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973); Biderman v. Morton, 497 F.2d 1141 (2 Cir. 1974). NEPA imposes a duty on local governments only upon their participation in a project that can be called "a partnership or joint venture with the Federal Government, and are thus recipients of federal funding." Biderman v. Morton, 497 F.2d at 1147. It is plain that at this moment the City and State have entered no partnership or joint venture with the Federal Government as to the housing. Moreover, the fact that the housing portion may in the future require preparation of a NEPA statement by virtue of the realities of the City's financing needs, when the housing otherwise would not have required one, hardly imposes any greater obligation on the Postal Service than it originally had. A similar action involving a local sewerage system was dismissed because no federal funds had been sought or granted. Bartunek v. Patterson, F.Supp. , No. C. 74-673 (N.D. Ohio, December 2, 1974) (Annexed hereto). It is too hypothetical, remote and premature to require the Postal Service to prepare an impact statement for the housing portion merely because the City's future potential connections with a different federal agency may eventually require

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one. Indeed a full study of the housing portion is presently impossible because of the "tentative" stage of planning. HUD's possible future involvement in the Morgan Annex is irrelevant to the Postal Service's obligation to prepare a separate impact statement on the housing. There is no greater obligation on the Postal Service if HUD becomes involved than if the City could afford to construct the housing without federal assistance. It is plain that under the Congressional scheme of Pub. L. 92-313 that the Postal Service has no responsibilities whatever for the housing other than to provide the foundations, for which the City must pay. Indeed, the Postal Service has only a reversionary interest if public housing is not built. If anything, HUD's involvement provides assurance that there will be proper interdisciplinary consideration of the environmental impact of the housing project on the Chelsea neighborhood prior to construction, under HUD's own regulations.

The District Court entirely misconstrued this issue, writing as if HUD were presently committed to preparing an EIS. HUD presently is not responsible in any way for the housing. Its only responsibility may arise if and when the City, through the State Division of Housing and Community Renewal, seeks federal assistance

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under Section 8 of the Housing and Community Development Act of 1974. 42 U.S.C. § 1437(f) which became effective January 1, 1975. The Proposed Rules § 1278.310(d), Department of Housing and Urban Development, Office of Low Rent Housing Assistance Payment Program -- State Housing Finance and Development Agencies, 39 Fed. Reg. 42754, 42761 (Dec. 6, 1974) require statements in compliance with NEPA, by reference to 38 Fed. Reg. 19182 (July 18, 1973) which makes effective HUD's Handbook 1390.1 "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality," as amended 39 Fed. Reg. 38922 (Nov. 4, 1974).

Thus the situation here is the converse of Ely v. Velde, 497 F.2d 252 (4 Cir. 1974) where local government sought to avoid the requirements of NEPA by transferring federal funds previously earmarked for a penal center to other state projects without state reimbursement to the federal government. In this case, by seeking HUD low income housing rent subsidies, the City, through the State agency, will bring itself within the purview of NEPA and will have to prepare a satisfactory NEPA statement under HUD regulations.

Under these circumstances, omission of a separate evaluation of the housing portion of the Morgan

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Annex from the Final Environmental Statement does not preclude construction of the VHF.

The Fifth and Tenth Circuits have recently upheld adequacy of environmental impact statements in the face of charges of "segmentation." Sierra Club v. Stamm, 507 F.2d 788 (10 Cir., 1974); Sierra Club v. Callaway, 499 F.2d 982 (5 Cir. 1974); Named Individuals of San Antonio Conservation Society v. Texas Highway Dept., 496 F.2d 1017 (5 Cir. 1974). See also Environmental Defense Fund, Inc. v. Armstrong, 352 F.Supp. 50 (N.D. Cal. 1972), supplemental opinion, 356 F.Supp. 131(N.D. Cal. 1973), aff'd, 487 F.2d 814 (9 Cir. 1974).

In holding segmentation permissible, the Callaway Court wrote:

> "We conclude that the Wallisville and Trinity River projects are not interdependent. The nexus between the projects is not such as to require an EIS evaluation of the Trinity project as a condition precedent to an EIS evaluation of Wallisville. The Wallisville EIS should speak for itself. Wallisville is a separate viable entity. It should be examined on its own merits. Although it has been made compatible in certain features with Trinity it is not a mere component, increment, or first segment of Trinity. The court erred in so holding." (499 F.2d at 990)

The Tenth Circuit similarly placed great reliance on whether the evaluated project was a separate,

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distinct logical entity that in itself constituted a "major federal action." The Court cited the trial judge's finding No. 16:

> "The Strawberry Aqueduct and Collection System has an independent utility of its own as a collection and conveyance system of waters from the designated Uinta Mountain streams for storage in the enlarged Strawberry Reservoir for release and use in the Bonneville Basin. Such system can operate and function separately from the remaining unconstructed systems of the Bonneville Unit or other units of the Central Utah Project. The termini of the Strawberry Aqueduct and Collection System, comprising the Solidier Creek Dam on the westerly end, and the Upper Stillwater Reservoir on the easterly end, delineate a reasonable and logical segment of the Bonneville Unit for discussion and analysis of the environmental impacts resulting therefrom, which remain unchanged regardless of the systems to be constructed for delivery and use of project waters within the Bonneville Basin. The major federal action of defendant Secretary Morton was limited to the approval of immediate construction of the Currant Creek Dam and to the continuation of the construction of the Strawberry Aqueduct and Collection System on a logical construction schedule. The detailed discussion and analysis of the Strawberry Aqueduct and Collection System contained in the FES and the explanation and discussion of the entire Bonneville Unit therein fully complies with the requirements of NEPA, and the applicable guidelines of the Council on Environmental Quality as to the scope, nature and extent of the project to be covered thereby." (507 F.2d at 791).

The Postal Service's separate treatment of the VMF is similarly justified. The VMF is a separate, self-sufficient unit that will operate and function without reliance on the existence of housing may commence since no

final architectural plans have been drawn and no application for funds to either the State or HUD has been received. The environmental impact of the VMF on the neighborhood lends itself to a separate evaluation from the impact of the housing. To paraphase Sierra Club v. Callaway, plaintiffs' claim that the construction of the VMF should await preparation and completion of the housing designs and financing plans would in effect be holding the Postal Service hostage to the air rights which the Congress conveyed to New York City. (499 F.2d at 993). That is not what Congress intended either by NEPA or by Pub. L. 92-313 or by the Reorganization Act.

It is conceded that the Environmental Impact Statement does not completely analyze the environmental impact of the housing. But that would be impossible to do at this stage of its planning. Nonetheless the Environmental Statement does address itself to the housing project as a whole consistent with the preliminary design status at the time of the filing of the EIS. Appropriate consideration was given the impact of the VMF and the ambient environment on the suitability of and design requirements for the housing. Specifically, the Court is referred to the following portions of the Environmental

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Statement: I-5, VII 2 to 4 for description of the housing component; III-2 and 4 B-10 to 12 for consideration of additional traffic generated by the housing component (all subsequent noise and traffic emissions analysis include this component); III-10 to 19, VIII-19 to 20, C-21, C-25 to 29, for consideration of air quality impact on proposed housing component; III-31, 38, VI-1, VIII-4, 25 for consideration of housing impacts on social environment III-32 to 33, VIII-24 to 25, A-1 to 3 for consideration of housing impacts on community services; III-33 to 34, VIII-26 to 28 for consideration of housing impacts on public utilities, energy requirements, etc.

The dangers such as crime attendant vertical separation of housing from the street are anticipated in the EIS. But the proper moment for full evaluation of whether these potential negatives can be resolved or are outweighed by potential positives is at the point when architectural plans are more firm. With respect to the other areas of possible impact raised sua sponte by the Court below, such as support services, failure to analyze them absent final plans concerning the number of housing units more to be built is hardly unreasonable. Moreover,

there will always to areas of impact not covered by the EIS: and NEPA "should not be a crutch for chronic fault-finding." Sierra Club v. Stamm, supra, 507 F.2d at 794.

Finally, segmentation is particularly appropriate in the instant case because of the Postal Reorganization Act. Even if that Act does not completely exempt the Postal Service from preparing impact statements on postal projects, the Act plainly contemplates relieving the Postal Service from the burdens imposed by Judge Ward with respect to the non-postal project for housing. Carried to its extreme, the decision below requires the Postal Service to consider all possibilities in terms of size and design for the housing -- possibilities which are entirely speculative -- or to await completion of final plans -- which, at best, will be months away.

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(C) EIS Consideration of Alternatives Was Adequate

Judge Ward found that the Environmental Impact Statement was inadequate because it gave only passing reference to the possible alternatives of "No Action" and "Scatter Sites."

Judge Ward gave only one reason why the "No Action" alternative was not sufficiently analyzed: "The EIS indicates that postal vehicles will travel an additional 580 miles daily by abolishing the Leroy Street facility and relocating the vehicles serviced there to the VMF." This misstates the case. Judge Ward evidently was referring to Table VII-2. That table does not indicate the net additional mileage for all postal vehicles by constructing the VMF. It states only the increased mileage of those trucks now operating out of Leroy Street; the only trucks which will have to travel farther. Judge Ward made no reference to Table B-5 (at B-13) in the EIS. Table B-5 sets forth a complete analysis of the proposed VMF as to each present garage location. While it is true that the net mileage difference for all vehicles from all garages is an increase of 100 miles, (far less than the 580 that Judge Ward erroneously cited) that is due solely to the net increase of 400 miles attributable

to the smaller 1/4 - 2 ton units working out of the Leroy Street and the Piers/34 Street garages. As to the larger 5 ton units and Diesel Tractors, there will be a total decrease of 300 miles which now operate from the 34th Street facility. Thus, there is a great improvement when analyzed in terms of the volume of mail being moved. Further, in citing the increase of 580 miles of vehicles garaged at Leroy Street, the District Court ignored the net environmental impact that the consolidated VMF will have: there will be a 5% reduction in carbon monoxide emissions from postal vehicles in the Chelsea area with the VMF and an 8% reduction city-wide.

Judge Ward also made no reference to the agency determination of the need for a consolidated garage, as stated at I-6 of the EIS. In this connection, the Postal Service submitted Exhibits H-P. These exhibits establish historically the reasons for the Postal Service determination that there is a need for a consolidated parking facility. The present facilities are scattered facilities. They are inefficient, uneconomic, too small, and detrimental to the environment. Moreover, scattered parking or no action inhibits keeping vehicles in good repair. One of the main assets of the new VMF is that it will

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include modern, efficient maintenance facilities. These facilities will improve both safety and the environment in New York City.

NEPA does not require the EIS to set forth alternatives known to the responsible agency to be inadequate. Life of Land v. Brinegar, 485 F.2d 460, 472 (9 Civ. 1973). And it is plain that an agency may rely on its own experience in determining adequacy. Cape Henry Bird Club v. Laird, 359 F.Supp. 404 (D. Va. 1973).

In this instance the Postal Service and other have undertaken fair and extensive investigations of possible alternative sites. These studies extend back in time more than ten years and all but the first recommend a centralized, Postal Service owned and constructed at the site adjacent to the Morgan Annex. The first study recommends a lease. The Postal Service contends that in light of this voluminous history of studies of alternative sites and their rejection for impracticality and in light of the evaluation that appears at V-1 to V-6, Attachment 13 pp 1 to 19, Tables B-5 and VIII-3, omission from the Environmental Statement of a full scale study of "Scatter Sites" and "No Action" can hardly be said to be "arbitrary and capricious." Morning-

side Renewal Council Inc. v. U.S. AEC, 482 F.2d 234 (2d Cir. 1973). The District Court erred in so finding.

POINT III

PLAINTIFFS' CLEAN AIR ACT CLAIMS SHOULD BE DISMISSED

Plaintiffs make two allegations under the Clean Air Act: first, they seek to enjoin the construction of the VMF because the presence of the VMF may inhibit attainment of the ambient air standards for carbon monoxide; second, they seek to enjoin construction of the VMF pending application for a New York State indirect source permit.

Appellants moved to the District Court to dismiss these allegations for lack of jurisdiction and failure to state a claim. That motion was denied.* Should appellants' arguments on NEPA be upheld by this Court, for the sake of expedition, this Court should direct the District Judge to dismiss these claims rather than to order a remand.

a) The Postal Service is Exempt from the Requirements of the Clean Air Act by Virtue of 39 U.S.C. § 410.

A full explication of this point appears in connection with Point I relating to NEPA. In short the

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* At the conference in chambers on settlement of the order, the District Court noted that the denial was intended to be without prejudice.

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Postal Service's position is that 39 U.S.C. §410 by its terms exempts the Postal Service from the application of any "Federal Law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds." The Clean Air Act, 42 U.S.C. § 1857 is a Federal Law within the categories specified by § 410(a). While the Clean Air Act was enacted after the Postal Reorganization Act, nothing in the Clean Air Act nor amendments to the Clean Air Act nor amendments to 39 U.S.C. § 410(b) have made the Clean Air Act applicable to the Postal Service. In this respect, the Clean Air Act is unlike the Noise Control Act of 1972, supra, § 3(1a) which was specifically made applicable to the Postal Service.

b) Plaintiffs' Claims of Prospective Violations of Ambient Air Standards Must Be Dismissed

On February 25, 1974, the Administrator of USEPA published his disapproval of the portion of New York State's Implementation Plan which deals with indirect sources such as the VHF. 39 Fed. Reg. No. 36 Part 3, p. 7269 et seq. at 7282-83. The Administrator amended 40 CFR § 52.1680(c) to provide: "Regulation for review of new or modified indirect sources. The provisions of § 52.22(b) of this chapter are hereby incorporated by reference and

made a part of the applicable implementation plan for the State of New York." Thus the Administrator has disapproved that portion of New York State's implementation plan dealing with indirect sources and replaced it by his own. The USEPA plan appears at 39 Fed. Reg. 7276-79. Originally, the USEPA requirements did not apply to any construction to be commenced prior to January 1, 1975. On December 24, 1974, the Administrator announced a six month delay, providing that USEPA's regulations will only apply to construction commenced after July 1, 1975. 39 Fed. Reg. 45014 (December 30, 1974).

New York State has recently submitted to the EPA a newly revised Part 203 of its implementation plan, which apparently would require indirect sources, such as the VMF, to obtain a construction permit. Counsel at EPA has advised this office that it expects to either approve or disapprove Part 203 within two months.

Currently there is no effective approved implementation plan in New York for carbon monoxide from indirect sources.

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Nonetheless, plaintiffs allege that the VMF will exacerbate violations of the CO eight hour air quality standards in Chelsea neighborhood.

Plaintiffs have no basis in the Clean Air Act to allege prospective violations of attainment dates for ambient air standards. Section 304 of the Clean Air Act permits suits for violations of "an emission standard or limitation under this Act." Emission standards are defined as "(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or (2) a control or criteria respecting a motor vehicle fuel or fuel additve." (§ 304(g)). Emission standards appear at Section 112 (42 U.S.C. § 1857c-7). Fuel additives appear at Section 211 (42 U.S.C. § 1857f-6c). Section 304 permits suits for violations of either of those provisions. When ambient air quality standards are involved, however, section 304 permits suit only to the extent that implementation plans are violated.

Under the scheme of the Clean Air Act, the Administrator may list a pollutant under Section 108 if he determines (1) it adversely affects health

and welfare, (2) its presence in the ambient air is from diverse sources, and (3) if he plans to issue air quality criteria. CO and NOx have both been listed under Section 108. The effect of listing a pollutant under Section 108 is to trigger procedures whereby the Administrator must, under Section 109, set ambient air quality standards for each pollutant throughout the nation. The States, in turn, are required under Section 110 to promulgate plans to control the presence in the ambient air of the listed pollutant to the level set by the Administrator. Those plans are called implementation plans. The pollutants treated under the section 108-110 procedures are called criteria pollutants.

Section 304 authorizes suits for violations of implementation plans; not for violations of ambient air standards. At least two courts have expressly held that the Act does not contemplate suits to forbid construction of a project that may interfere with attainment of national ambient air standards when there is no allegation that an effective implementation plan will be violated. Plan of Arcadia v. Anita Associates, 6 ERC 1606 (C.D. Cal. 1973) aff'd 6 ERC 1975 (9 Cir. 1974);

City of Highland Park v. Train, 374 F. Supp. 758 (N.D. Ill. 1974).

The Administrator of the United States Environmental Protection Agency has also construed Section 304 to permit suits charging violations of existing implementation plans but not suits charging violations of ambient air standards when there is not implementation plan in effect. (EPA Brief in Plan for Arcadia.) That interpertation is entitled to great weight, since the Administrator is charged with the primary enforcement role under the Clean Air Act. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, (1933).

Plaintiffs have incorrectly suggested that Citizens Associates of Georgetown v. Washington, 6 ERC 2093, 2095 (D.D.C. 1974) held that such suits are permitted under Section 304. Judge Richey there held that suits to forbid construction of a project that precluded attainment of a national ambient air quality standards were permissible under Section 304 where there were allegations of prospective violations of an implementation plan. Indeed, Judge Richey wrote that "emission limitations" means "those

measures within state implementations plans which are necessary to insure attainment and maintenance of national primary and secondary air quality standards." (emphasis added.)

As explained above, there is no effective, approved implementation plan in New York State with respect to indirect sources. There is one New York State Implementation plan to achieve Section 109 standards for carbon monoxide. That plan consists of several parts. But the indirect source controls part of the plan -- which undisputedly concerns garages -- was disapproved and the new Part 203 has not even been published for public comment.

Currently, the only effective portion of New York State's implementation plan which may arguably pertain to construction of garages is strategy B-3 of the Transportation Control Plan. (Exh 00)(Part 203 is Exh. PP). B-3 however is limited to the central business district. While there is no operational definition of central business district within the State Plan, under the City Planning definition, Chelsea is not within it. Moreover strategy B-3 does not apply to the VMF which only serves to consolidate existing parking. In any event, plaintiffs point to no aspect of B-3 that will be violated if the VMF is built.

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Since there is no effective implementation plan that will be violated by construction of the VMF, there is no jurisdiction under Section 304. See Citizens for Clean Air v. Corps of Engineers, United States Army, 356 F.Supp. 14 (S.D.N.Y. 1973 Gurfein, J.) ("42 U.S.C. §1857h applies only to violation of emission standards and orders of the Administrator.") Nor is there any basis for jurisdiction under 28 U.S.C. §§ 1361, 2201-02, or 1331. New Mexico Citizens v. Train, 6 ERC 2066 (D.N.M. 1974).

As the Ninth Circuit wrote in Plan for Arcadia, "the state of California has submitted an implementation plan which has been approved in part and rejected in part. The area of the shopping center here involved is presently subject to no control that would prevent its construction or operation as appellees contend... Since, as noted, no applicable standards or orders have been issued, this action will not lie under [Section 304, 42 U.S.C. §1857h] (1) .... Congress has defined precisely the circumstances under which a private suit may be brough under this Act. As the court below correctly determined, appellants do not meet that test." [6 ERC at 1976]

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The situation here is precisely the same, requiring dismissal of plaintiffs' claims under the Clean Air Act that the VMF threatens achievement of ambient air standards.*

c) Plaintiffs' Claims To Require State Permit Must Be Dismissed

Plaintiffs claim that under Section 118 of the Clean Air Act the Postal Service must obtain a New York State construction permit must be rejected on several grounds.

First, the Postal Service is not required to obtain a state permit under the rationale of Kentucky v. Ruckelshaus, 497 F.2d 1172 (6 Cir. 1972). See also California v. Stastny, 4 ERC 1447 (C.D. Cal. 1972). The doctrines of sovereign immunity and the supremacy clause preclude requiring a federal agency to comply with state procedural regulations. To the extent that Alabama v. Seeber, 7 ERC 1625 (5 Cir. 1974) is to the contrary, this court is urged to reject it. (A petition for certiorari is pending before the Supreme Court on the Kentucky and Alabama cases.)

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* Appellants do not concede that even if there is jurisdiction to allege these claims that plaintiffs can succeed on the merits. The Postal Service offered below proof that construction and operation of the VMF will not exacerbate the achievement of ambient air standards. Indeed, the evidence establishes that there will be a reduction in Carbon monoxide emissions as a result of the VMF.

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Second, this court lacks jurisdiction since Section 304 only permits suits where there are approved and effective implementation plans. New York State's permit requirement is contained in that part of the implementation which had been disapproved by the USEPA.

Third, even if Section 118 may be construed to give jurisdiction, plaintiffs have failed to state a claim upon which relief can be granted. Alabama v. Seeber, supra, 7 ERC at 1028, relied on by plaintiffs was careful to limit its holding as follows "... the provisions of the implementation plans adopted and approved...are applicable to federal facilities." Similarly, § 4(a)(1) of Executive Order No. 11752 (Dec. 19, 1973) provides for federal compliance with local laws only when they are "adopted in accordance with or effective under the provisions of the Clean Air Act." No state law can be said to be adopted in accordance with the Clean Air Act until the EPA has approved it from a procedural and substantive standpoint. To hold that a state regulation adopted pursuant to the Clean Air Act requires a federal facility to comply prior to EPA approval raises the specter of interim compliance with a State plan which may be disapproved in

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the future, as occurred with New York's previous plan for indirect sources. Plainly the determination of whether the plan is in accordance with has been delegated to the Administrator of the EPA under Section 110 of the Clean Air Act. And any waiver of sovereign immunity by Section 118 is contingent upon EPA approval, as Alabama v. Seeber itself noted at 7 ERC at 1031.

Section 118 must be read with a gloss from Section 304; at most it requires federal agencies to comply with the Clean Air Act to the same extent that non-federal agencies must comply.* As stated above there is no claim under the Clean Air Act for violations of ambient air standards absent violations of an implementation plan. Similarly, under Section 118, any right of action that may be established under that Section must be limited to violations of existing and approved implementation plans. Since New York State's plan requiring permits was disapproved, there is no effective plan under the Clean Air Act under which the Postal Service must obtain a state permit. Accordingly plaintiffs' allegations concerning the Clean Air Act must be dismissed.

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* The Postal Service, pursuant to the Reorganization Act, should be required to do no more.

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CONCLUSION

The order of preliminary injunction should be reversed and the Clean Air Act allegations in the complaint should be dismissed.

Dated: New York, New York

March , 1975

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss

MURPHY BONEY, being duly sworn, deposes and says that he is employed in the office of the United Sates Attorney for the Southern District of New York, a s a messengar.

That on the 19th day of March, 1975, he did serve (2) two true copies of the annexed Appellant's Brief and 1 copy of the Appendix on the office of Messrs. Berle, Butzel & Kass, 425 Park Ave. N.Y. N.Y., by leaving copies thereat.

Murphy G Boney

Sworn to before me this

19th day of March, 1975

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975